Supreme Court, U.S.
FILED

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No.

In The
Supreme Court of the United States
October Term, 1997

EDWARD A. JOHNSON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

WHETHER THE COURT SHOULD RESOLVE THE INTRA-CIRCUIT CONFLICT WHERE THE PANEL CLEARLY DEPARTED FROM UNITED STATES SUPREME COURT PRECEDENTS BY MISAPPLYING THE HARMLESS ERROR DOCTRINE TO A JURY INSTRUCTION THAT DIRECTED A VERDICT AGAINST THE APPELLANT ON AN ESSENTIAL ELEMENT OF THE CRIMINAL OFFENSES WHERE THE DEFENDANT HAS MADE A CONTEMPORANEOUS OBJECTION TO THE INSTRUCTION AT TRIAL?

LIST OF PARTIES

Pursuant to Supreme Court Rule 14.1(b), the following is a list of all parties to the proceedings:

Barcella, Lawrence
Burr, Jorge
Cardoen, Carlos
Griffin, Ronald
Houlihan, Gerald J.
INDUSTRIAS CARDOEN LIMITADA
Johnson, Edward A
Keggereis, Sharon L
Linklater, W. Joseph
Londergan, Jim
McKenzie, John
O'Neill, Brian:
Palmer, Eduardo
Pena, Humberto J
Pollack, Thomas
Reetz, Ryan C.
Saffa, Franco
Scherker, Elliot H
SERVICIOS MAQUINARIAS E IMPEMENTOS, S.A. ("SMISA")
Shirley, Madeline
Strafer, G. Richard
SWISSCO Management Group, Inc.
Tamen, Frank
TELEDYNE INDUSTRIES, INC
TELEDYNE WAH CHANG ALBANY
Zuckerman, Roger

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OPINION BELOW

The April 28, 1998 opinion of the United States Court of Appeals for the Eleventh Circuit is reported at *United States v. Johnson,* 139 F.3d 1359 (11th Cir. 1998). A copy of *Johnson* is attached as **APPENDIX A.**

JURISDICTION

The opinion of the Eleventh Circuit in Johnson was filed on April 28, 1998. The Eleventh Circuit denied rehearing on June 25, 1998. See **APPENDIX C.** This petition for a writ of certiorari follows within 90 days of the latter date. See Supreme Court Rules, Rule 13. The Court's jurisdiction is invoked under Title 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment guarantees that no one will be deprived of liberty without "due process of law"; and the Sixth Amendment provides: "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury." U.S. Constitution, Amendments V. and VI.

STATEMENT OF THE CASE

A. Procedural History

On May 26, 1993, the appellant, Edward Johnson, was charged in 7 counts of multiple-count, multiple-defendant indictment. Count I charged Johnson, Johnson's employers (hereinafter "Teledyne"), Carlos Cardoen (a Chilean industrialist and arms manufacturer), and two of Cardoen's companies

with conspiring to: (1) make materially false statements to the Commerce Department, in violation of 18 U.S.C. § 1001, in connection with export license applications for zirconium metal; (2) exporting zirconium without obtaining licenses from the State Department, in violation of 22 U.S.C. § 2778; and (3) exporting zirconium to Chile, a country banned from receiving munitions exports from the United States under 50 U.S.C. § 2410. Johnson was also charged with substantive violations of Section 1001 (Counts V and VIII), Section 2410 (Count II) and Section 2778 (Counts III, IV and VI.) (R1-1.)

On April 4, 1995, the jury acquitted Johnson of Count II-IV but convicted him of the conspiracy charge (Count I), the two false statement charges (Counts V and VIII) and one export charge (Count VI). On August 7, 1995, the Honorable Shelby Highsmith sentenced Johnson to serve a total of 41 months in prison and to pay a fine of $25,000. (R7-553, 554.)

B. Statement of the Facts

For purposes of this Petition, Johnson adopts the "Fact" section of the Eleventh Circuit's decision in *United States v. Johnson,* 139 F.3d 1359 (11th Cir. 1998). **APPENDIX A**

C. The Eleventh Circuit's Decision

The Eleventh Circuit in *Johnson* rejected the argument that the district court's instruction in his case was *per se* reversible error. However, unlike the situation in the other *Johnson*, his trial attorney ***did*** preserve the instructional error for appellate review and because the district court did not merely fail to instruct the jury on an essential element. The district court in this case **directed a verdict** on that element, and Johnson specifically pointed out that the Eleventh Circuit

has repeatedly held that directing a verdict on an essential element can never be harmless error. *See, e.g., United States v. Rogers*, 94 F.3d 1519, 1526 n. 13 (11th Cir. 1996), *cert. granted*, 117 S.Ct. 1841 (1997), and *dismissed as improvidently granted*, 118 S.Ct. 673 (1998); *United States v. Medina*, 90 F.3d 459, 464 (11th Cir. 1996); *United States v. Goetz*, 746 F.2d 705, 709 (11th Cir. 1984).

REASON FOR GRANTING THE WRIT

I. THE COURT SHOULD GRANT THE PETITION BECAUSE DIRECTING A VERDICT ON AN ESSENTIAL ELEMENT IS NEVER HARMLESS UNDER BINDING SUPREME COURT AND ELEVENTH CIRCUIT PRECEDENTS AND THE PANEL CREATED AN INTRA-CIRCUIT CONFLICT BY MISAPPLYING THE HARMLESS ERROR DOCTRINE TO A JURY INSTRUCTION THAT DIRECTED A VERDICT AGAINST THE APPELLANT ON AN ESSENTIAL ELEMENT OF THE CRIMINAL OFFENCE.

A. Jury Instructions

Johnson submitted three written proposed jury instructions to the district court concerning the false statement charges. These instructions specifically requested that ***the jury*** be instructed and required to find, as essential elements of the Section 1001 charges in Counts I, V and VIII case, that the alleged "false statements" were "material" to the Commerce Department's decisions to grant the export licenses. The

proposed instructions also contained a definition of "materiality" for the jury to consider. *Id.*[1]

The district court refused to issue Johnson's requested instructions and, instead, instructed the jury -- consistent with then Eleventh Circuit practice --

> "that the issue of materiality is not submitted to you for your decision but is a matter to be determined by the Court." (1SR29: 4526.)

The district court then went one step further and ***directed a verdict*** on the "materiality" element of the Section 1001 charges by telling the jury:

> "You are ... instructed, that the alleged facts charged in the indictment as having been falsified would be material facts." *Id.*

Johnson objected to this instruction, stating that the issue of materiality was "an issue of fact for the jury." (1SR29: 4212.) However, the district court, refused to reconsider its ruling

B. The Panel Decision

After Johnson's trial, the United States Supreme Court changed the law and held that issues of "materiality" were

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[1]Johnson's submission of requested jury instructions on the issue of "materiality" was, standing alone, enough to preserve his objection for appeal. *United States v. Grigsby*, 111 F.3d 806, 814, n. 7 (11th Cir. 1997); *United States v. Morris*, 20 F.3d 1111, 1114 n. 3 (11th Cir. 1994).

issues of fact for juries to decide. *United States v. Gaudin*, 515 U.S. 506 (1995). The Supreme Court, however, did not consider or decide the type of harmless error review governing the instructional defect. While Johnson's appeal was pending, the United States Supreme Court also decided *United States v. Johnson*, 117 S.Ct. 1544 (1997). In *Johnson*, the Supreme Court held that a trial court's failure to *sua sponte* instruct a jury on the "materiality" element of a false statement charge -- *i.e.*, in the absence of any contemporaneous objection by defense counsel -- was not "plain error" under Fed. R. Crim. P. 52(b).

In his appeal, Johnson argued that the district court's instruction in his case was *per se* reversible error, because, unlike the situation in *Johnson*, his trial attorney ***did*** preserve the instructional error for appellate review and because the district court did not merely fail to instruct the jury on an essential element. The district court in this case directed a verdict on that element, and Johnson specifically pointed out that the Eleventh Circuit has repeatedly held that directing a verdict on an essential element can never be harmless error. *See, e.g., United States v. Rogers*, 94 F.3d 1519, 1526 n. 13 (11th Cir. 1996), *cert. granted*, 117 S.Ct. 1841 (1997), and *dismissed as improvidently granted*, 118 S.Ct. 673 (1998); *United States v. Medina*, 90 F.3d 459, 464 (11th Cir. 1996); *United States v. Goetz*, 746 F.2d 705, 709 (11th Cir. 1984).

On April 28, 1998, the Panel issued its opinion herein. *See* **APPENDIX A**. The Court rejected Johnson's arguments, holding that "a *Gaudin* error is subject to the harmless error standard of review." *Id.* at pp. 6-7, citing *United States v. Johnson*, 117 S.Ct. 1544 (1997), and *United States v. Fern*, 117 F.3d 1298 (11th Cir. 1997). *Fern*, like *Johnson*, was decided under a "plain error" standard of review. *See Fern*,

117 F.3d at 1307. And, neither *Fern*, *Johnson* nor the Panel opinion addressed the fact that the instruction in this case directed a verdict on an essential element and, hence, should have been *per se* reversible error under the Eleventh Circuit's prior decisions in *Rogers*, *Medina* and *Goetz*.

As demonstrated below, the "harmless error" standard employed by the Panel conflicts with the definition set forth in two decisions of the United States Supreme Court, and three decisions of the Eleventh Circuit Court of Appeals.

C. Supreme Court Precedents

Contrary to the reasoning employed by the Panel, the standard governing this case is not the "plain error" standard employed in *United States v. Johnson*, 117 S.Ct. 1544 (1997), to review mere instructional omissions, but by *Sullivan v. Louisiana*, 508 U.S. 275 (1993), and *Yates v. Evatt*, 500 U.S. 391 (1991).

In *Yates*, 500 S.Ct. 391 (1991), the Supreme Court established the test for "harmless error" to a claimed error in a jury instruction which has been properly preserved for appellate review. The reviewing court must identify which facts the jury ***actually considered*** "in accordance with the instructions" given at trial. *Yates*, 500 U.S. at 404. Therefore, under *Yates*, when a trial court directs a verdict on an essential element of an offense, the error cannot be dismissed as harmless by reviewing the evidence under *Chapman v. California*, 386 U.S. 18 (1967). Since that evidence was never considered and no verdict thereon rendered by ***the jury***, *Chapman* is inapplicable.

The *Yates* method of applying harmless error to properly preserved objections to a jury instruction was confirmed by the Supreme Court in *Sullivan v. Louisiana*, 508 U.S. 275 (1993):

> Harmless-error review looks, we have said, to the basis on which "the jury ***actually rested its verdict,***" *Yates v. Evatt*, 500 U.S. ____, ____, 111 S.Ct. 1884, 1893, 114 L.Ed.2d 432 (1991) (emphasis added). The inquiry, in other words, is not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in *this* trial was surely attributable to the error. That must be so, because to hypothesize a guilty verdict that was never in fact rendered -- no matter how inescapable the findings to support that verdict might be -- would violate the jury trial guarantees. [Citations omitted.]

Sullivan, 508 U.S. at 280-81 (emphasis in original).

When jury instructions direct a verdict on an essential element of a crime, they necessarily deprive a defendant of his right to have the jury consider the evidence. Hence, such an error can never be harmless:

> The [right to a jury trial] includes, of course, as its most important element, the right to have the jury, rather than the judge, reach the requisite finding of "guilty." [Citation omitted.] Thus, although a judge may direct a verdict for the defendant if the evidence is

> legally insufficient to establish guilt, ***he may not direct a verdict for the State, no matter how overwhelming the evidence***. [Citations omitted.]

Sullivan, 508 U.S. at 280-81 (emphasis added).

As in *Sullivan*, the jury in this case neither (1) considered the evidence as it related to the element of materiality nor (2) rendered a verdict on that element, because the court's instructions directed a verdict on that element. "Since, for the reasons describe above, there has been no jury verdict within the meaning of the Sixth Amendment" on the issue of materiality "the entire premise of *Chapman* [harmless error] review is simply absent." *Sullivan*, 508 U.S. at 280-81, citing *Chapman v. California*, 386 U.S. 18 (1987).

The 1997 decision in *United States v. Johnson*, 117 S.Ct. 1544 (1997), did not give the Panel the authority to depart from *Sullivan*. *Sullivan*, not *Johnson*, is the Supreme Court precedent most directly on point since *Sullivan* involved (1) a properly preserved objection (2) to an instruction which directed a verdict. The Supreme Court has cautioned Courts of Appeals that

> "[i]f a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions."

Rodriguez de Quijas v. Shearson/America Express, Inc., 490 U.S. 477, 484 (1989). This Court has repeatedly recognized this principle, noting that

> "we are not at liberty to disregard binding case law that is so closely on point and has been only weakened, rather than directly overruled, by the Supreme Court."

Florida League of Professional Lobbyists v. Meggs, 87 F.3d 457, 462 (11th Cir. 1996) (quoting *Rodriguez*), *cert. denied*, 117 S.Ct. 516 (1997). *Accord, Engineering Contractors Ass'n v. Metro. Dade County*, 122 F.3d 895, 908 (11th Cir. 1997) (same).

The Supreme Court's decision in *Sullivan* "has direct application" to this case while the only similarity between this case and *Johnson* is that it involves the same element of the same crime. However, nothing in *Sullivan* or *Johnson* suggests that the ***nature of the crime or statutory element*** is determinative. On the contrary, the reasoning in *Johnson* was driven by the fact that there was no objection to lack of instruction on "materiality" and the apparent failure of Johnson to raise the directed verdict issue in the Supreme Court.

That the decision in *Johnson* did not determine the issue raised in this case is underscored by the Supreme Court's more recent ruling in *Rogers v. United States*, 118 S.Ct. 673 (1998). The Supreme Court in *Rogers* initially granted certiorari to review this Court's decision in *United States v. Rogers*, 94 F.3d 1519 (11th Cir. 1996), where the Court held that a ***preserved*** objection to a court's ***failure to instruct*** on an essential element could be subject to harmless

error review. As discussed more fully below, in so ruling, the Eleventh Circuit in *Rogers* expressly distinguished a mere "instructional omission" from a ***directed verdict*** which the Circuit Court acknowledged could never be harmless. *Rogers*, 94 F.3d at 1526 n. 13, citing *Rose v. Clark*, 478 U.S. 570, 578 (1986), and *United States v. Goetz*, 746 F.2d 705, 709 (11th Cir. 1984).

The Supreme Court granted certiorari "to decide whether a district court's failure to instruct the jury on an element of an offense is harmless error where, at trial, the defendant admitted that element." *Rogers*, 118 S.Ct. at 675; *id.*at 677 (O'Connor, J., and Scalia, J., concurring) (characterizing issue raised as "an important issue of constitutional law"). There is not the slightest hint in *Rogers* that the Supreme Court felt that this issue had ***already*** been resolved the previous term in *Johnson*. *See United States v. Ladish Malting Co.*, 135 F.3d 484, 491 (7th Cir. 1998) (recognizing that the Supreme Court "has twice recently noted ***but failed to resolve***" the issue of whether the removal of an element of an offense from a jury's consideration could ever be harmless, citing to *Johnson* and *Rogers*) (emphasis added). Certiorari was dismissed in *Rogers*, because the Court determined that the jury was, in fact, adequately instructed on the allegedly missing element.

D. The Eleventh Circuit Precedents

In determining and applying a definition of harmless error to directed verdicts which governs the Eleventh Circuit, the Panel was ***not*** writing on a clean slate. Its ruling not only departed from clear Supreme Court precedent but from clear, and binding, precedents of the Eleventh Circuit Court of Appeals.

As noted above, in *United States v. Rogers*, 94 F.3d 1519 (11th Cir. 1996), the Eleventh Circuit acknowledged the difference between a mere "instructional omission" and a directed verdict. Noting that the Court had already held, in *United States v. Goetz*, 746 F.2d 705, 709 (11th Cir. 1984), "that it cannot be harmless when the trial court directs a verdict on an element of the crime charged," the Court "wholeheartedly" reaffirmed *Goetz* "as an accurate recitation of the law." *Rogers*, 94 F.3d at 1526 n. 13, citing *Rose v. Clark*, 478 U.S. 570, 578 (1986) ("harmless-error analysis presumably would not apply if a court directed a verdict for the prosecution in a criminal trial by jury"). *Accord, Roy v. Gomez*, 81 F.3d 863, 866-67 (9th Cir. 1996) (en banc) (distinguishing between situations where trial court merely omits an essential element from situation in *Gaudin* where court directs a verdict and entirely removes the element from the jury's consideration).

The Eleventh Circuit used the same analysis to reverse a drug conviction in *United States v. Medina*, 90 F.3d 459, 464 (11th Cir. 1996). In that case, the district court removed from the jury's consideration a jurisdictional element for the defendant's prosecution for possession of cocaine on board a vessel subject to the jurisdiction of the United States. After the district court received a question from the jury about the jurisdiction issue, the district court's "response informed the jury that the matter of jurisdiction had been resolved by the court and was of no concern to them." *Medina*, 90 F.3d at 462. The Court found that the instruction directed a verdict on the jurisdictional element and reversed the defendant's conviction based on its holding in *Goetz*. The Court explained "[t]hat a trial judge cannot direct a verdict in favor of the government for all ***or even one element of a crime***." *Id.* at 464 (emphasis added, citing *Goetz*). "A directed verdict

in a criminal trial, ***either in whole or in part***, cannot be viewed as harmless error." *Id.* (emphasis added). *Accord, United States v. Wiles*, 102 F.3d 1043, 1060 (10th Cir. 1996) ("structural error can exist where a constitutional error affects a single element and causes the absence of a verdict on that element," *citing California v. Roy*, 117 S.Ct. 337, 339-40 (1996) (Scalia, J., concurring)), *rehearing granted in part and denied in part*, 106 F.3d 1516 (10th Cir. 1997), *cert. denied*, 118 S.Ct. 363 (1998).

Thus, in *Rogers*, *Medina* and *Goetz*, the Eleventh Circuit either held outright (*Medina* and *Goetz*) or stated in strong dicta (*Rogers*) that directing a verdict on an element of an offense is *per se* reversible error. The Panel herein did not even cite much less recognize the binding nature of *Goetz* and *Medina*, despite the fact that *Goetz* had been "wholeheartedly" reaffirmed only a few months earlier "as an accurate recitation of the law." *See Rogers*, 94 F.3d at 1526.

As previously discussed, the intervening decision in *Johnson* did not address either the directed verdict issue or the effect on a contemporaneous objection to its analysis. When appellate courts determine the effect of an erroneous jury instruction which was *not* objected to at trial, reversal is permitted only for "plain error" under Fed. R. Crim. P. 52(b). By its own terms, "Rule 52(b) is permissive, not mandatory," and "the standard that should guide the exercise of remedial discretion under Rule 52(b)" is whether an error affected "substantial rights" and "seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings.'" *United States v. Olano*, 507 U.S. 725, 735-36 (1993) (citation omitted). *Accord, Johnson*, 117 S.Ct. at 1547. In order to meet these burdens, the defendant must show that the error actually "affected the outcome of [her]

trial." *United States v. Kramer*, 73 F.3d 1067, 1074 (11th Cir. 1996) (citing *Olano*). And, even if such a showing is made, an appellate court still has the discretion not to notice the error. *Kramer*, 73 F.3d at 1075 (citing *Olano*).[2]

All the post-*Gaudin* cases that the Eleventh Circuit has previously addressed, other than the instant one, have been decided under a "plain error" standard -- the standard requiring the defendants to show actual prejudice. *See, e.g., United States v. Frost*, Case No. 93-9382 (11th Cir. April 23, 1998), 1998 U.S. App. LEXIS 7835; *United States v. Fern*, 117 F.3d 1298 (11th Cir. 1997); *United States v. Calhoun*, 97 F.3d 518 (11th Cir. 1996); *United States v. Toussaint*, 84 F.3d 1406 (11th Cir. 1996); *Kramer*, 73 F.3d at 1074. In each of these cases, the Court either found that the defendants failed to show such prejudice or ruled that it was declining to reverse, in any event, under the discretionary prong of *Olano*.

Where the instructional error is objected to and involves the directing of a verdict on an element of an offense, *Medina* establishes that the Court has no discretion to excuse the error as "harmless." As in *Medina*, the Panel herein was required to apply the definition of "harmless error" found in *Yates* and *Sullivan* -- a definition which focuses on whether the jury ever considered the evidence and rendered a verdict on all elements of the offense based upon the instructions given by the district court. The Court in *Medina* properly applied *Yates* and *Sullivan*, as well as the

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[2] As the Supreme Court in *Olano* made clear, "a plain error affecting substantial rights does not, without more, satisfy the standard, for otherwise the discretion afforded by Rule 52(b) would be illusory." *Olano*, 507 U.S. at 737.

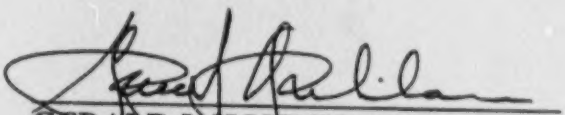
prior binding decision of the Eleventh Circuit in *Goetz*, and reached the correct result. The Panel in this case, however, mistakenly reviewed the instruction under a "plain error" standard -- hence, the Panel's reliance on *Johnson* and *Fern*. It then compounded that mistake by not following binding precedents in the Eleventh Circuit concerning the *per se* reversible nature of directed verdicts.

The Supreme Court in *Johnson* did not purport to decide: (1) whether ***directing a verdict*** on an essential element of an offense, such as "materiality", could ever be harmless; or (2) whether ***a contemporaneous objection*** to a "Gaudin" error of any kind (either eliminating "materiality" as an element or directing a verdict on it) could ever be harmless. Accordingly, the issue should be reviewed by the court. This case provides an appropriate vehicle upon which to establish and confirm the important issue of what standard of review governs a properly preserved objection to a directed verdict on an element of a criminal offense. The Supreme Court should resolve the issue.

CONCLUSION

For the foregoing reasons, the Petitioner respectfully requests that his Petition For a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit be granted.

Respectfully submitted,



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PUBLISH

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 95-5021

D.C. Docket No. 93-241-CR-HIGHSMITH

UNITED STATES OF AMERICA.

Plaintiff-Appellee,

versus

EDWARD A. JOHNSON,

Defendant-Appellant.

Appeal from the United States District Court for the
Southern District of Florida

(April 28, 1998)

Before TJOFLAT and BIRCH, Circuit Judges, and RONEY,

Senior Circuit Judge.

RONEY, Senior Circuit Judge:

Defendant Edward A. Johnson was convicted of crimes which focused on sales between 1982 and 1987 to Chilean purchasers of zirconium which was made into cluster bombs sold to Iraq. Although the export of the zirconium for this purpose was prohibited by laws of the United States, Johnson sought to defend the charges against him by establishing that the United States - in particular, Presidents Ronald Reagan and George Bush, the Central Intelligence Agency and high ranking members of the military - encouraged the Teledyne companies, Johnson's employers, to export the zirconium, knowing the purchasers would use it to manufacture cluster bombs for Iraq, because at the time the United States was secretly supporting Iraq in its war with Iran. The district court held that the defendant failed to make his case in this regard. Rulings made in connection with that decision are at the heart of the appeal. We affirm.

Defendant Edward A. Johnson was convicted by a jury on four counts: criminal conspiracy, 18 U.S.C. §371, making false statements to the government, 18 U.S.C. §1001, and two counts of exporting zirconium compacts in violation of the Arms Export Control Act ("AECA"), 22 U.S.C. §2778. He appeals with issues relating to the "materiality" requirement of false statement prosecutions, the definition of the United States Munitions List referred to in the AECA, the use of classified information as evidence in criminal trials, and the proper jury instructions for the defense of good faith reliance on the advice of counsel. The government cross-appeals Johnson's sentence.

CHARGES

The Arms Export Control Act authorizes the President to designate a special list of defense-related articles, known as the "Munitions List," which require a special license from the

Department of State before they legally may be exported from the United States. *See* 22 U.S.C. §2778(a)(1) (1194). Defense-related articles which also have non-military applications, known as "dual use" items, are excluded from the Munitions List and only require an export license from the Department of Commerce. *See* 22 C.F.R. § §120.3-120.4 (1985).

Johnson was convicted for his role in a conspiracy to illegally export zirconium compacts to Chile. Although the zirconium compacts were used to manufacture cluster bombs, the end-use statements used to procure export licenses stated that the zirconium would be used in industrial explosives. Johnson was charged with criminal conspiracy, exporting zirconium compacts designed for use in cluster bombs without a license from the Department of State, and making false statements to the government. All of the charges required the government to prove that Johnson acted with specific intent to commit these crimes.

FACTS

Between 1983 and 1988, Teledyne Wah Chang Albany ("TWCA"), an American manufacturing company, exported over $3.5 million worth of zirconium to Chile. Zirconium is a rare metal with incendiary properties. The zirconium was sold to Carlos Cardoen, an international arms merchant based in that country. The zirconium was used as an incendiary agent in cluster bombs that Cardoen was selling to Irag for use in the Iran-Iraq war. Most of the zirconium sold to Cardoen was in form of manufactured zirconium compacts specifically designed for use in cluster bombs. In 1982, before zirconium shipments commenced, TWCA asked the Department of State Office of Munitions Control ("OMC") for a ruling on whether zirconium was on the Munitions List. It explained that TWCA

wished to export zirconium for use in industrial explosives. In early 1983, OMC issued a commodities jurisdiction ruling stating that zirconium was a dual use item and therefore was excluded from the Munitions List. After reviewing this favorable response from the Department of State, TWCA applied for export licenses from the Department of Commerce. Although Cardoen used the zirconium to manufacture cluster bombs, he provided TWCA with false end-use statements stating that the zirconium would be used as a booster material in industrial explosives sold to the mining industry. TWCA used these false end-use statements to procure export licenses from the Department of Commerce.

Edward Johnson was a sales manager of ordnance grade zirconium at TWCA. Although zirconium has civilian applications, the vast majority of Johnson's zirconium customers used the material to manufacture munitions, particularly cluster bombs. Beginning in 1982, Carlos Cardoen began placing large zirconium orders through Johnson. Most of Cardoen's orders were not for loose zirconium sponge, a raw material, but rather for zirconium sponge compacts, which are a manufactured component used in munitions such as cluster bombs. Throughout the period of the alleged conspiracy, Johnson continued to be one of Cardoen's primary contacts at TWCA. He accepted and processed all of Cardoen's zirconium orders and he negotiated pricing and shipping arrangements on behalf of TWCA.

PROCEEDINGS AT TRIAL

At trial, Johnson portrayed himself as a low-level salesman who had no idea that he was being used as a pawn in the international armaments game. He claimed that he had been duped into believing that the zirconium was being used to

manufacture industrial explosives rather than cluster bombs, and that he had relied on management assurances that that zirconium shipments complied with export regulations. The jury was not convinced, and because Johnson received a fair trial, we will not disturb their verdict.

The evidence at trial provided ample grounds for a jury finding that Johnson was a knowing and willing participant in the conspiracy. Johnson knew that TWCA faced potential environmental and safety liability if it did not find a profitable market for its excess zirconium. In 1984, Johnson traveled to Chile for meetings with Cardoen. He brought with him sample zirconium compacts which had been specifically designed for use in cluster bombs. The meetings in Chile centered around Cardoen's arms business, and included detailed discussions of zirconium's military applications. During later trips to Chile in 1987, Johnson visited Cardoen's cluster bomb factory and witnessed burn testing of zirconium compacts TWCA had provided Cardoen for use in his MK 83/84 bombs. Several witnesses testified as to Johnson's knowledge that the zirconium compacts exported to Cardoen were being used to manufacture Iraqi cluster bombs. James Meyerink testified that in 1984, he overheard Johnson and other employees of TWCA discussing that the zirconium would be used to manufacture cluster bombs and ridiculing the end-use statements they had provided to the government listing industrial explosives as the purpose of the exports. Richard Jenkins testified that Johnson told him that the zirconium pellets were being used to manufacture Iraqi cluster bombs. Augusto Giangrandi, Cardoen's assistant, testified that he had several meetings with Johnson in which they ironed out pricing and shipping details relating to the zirconium exports. Giangrandi testified that Johnson knew that Cardoen was supplying cluster bombs containing zirconium to Iraq, and that the volume of future

zirconium orders from TWCA depended on Iraq's need for bombs. Giangrandi and Johnson also discussed the specific zirconium requirements of individual Iraqi bomb contracts Cardoen planned to bid for.

ISSUES ON APPEAL

Johnson raises four specific issues in this appeal. *First*, the district court committed reversible error when it held that Johnson's false statements were material as a matter of law, rather than submitting the issue to the jury. *Second*, the commodities jurisdiction ruling issued by the Office of Munitions Control precluded liability under the Arms Export Control Act or required a jury instruction on uncertainty in the law. *Third*, the district court made reversible evidentiary rulings, concerning classified information. *Fourth*, the court's supplemental jury instruction on his defense of good faith reliance on the advice of counsel incorrectly stated the law and misled the jury. We address each of these arguments in turn.

"MATERIALITY" OF STATEMENTS

In accordance with then-Circuit precedent, the district court ruled that the "materiality" element of a false-statement prosecution was a question for the judge, and directed the jury that the statements alleged were material. In *United States v. Gaudin*, 515 U.S. 506 (1995), the Supreme Court held that the Fifth and Sixth Amendments' guarantees of due process and jury trial required courts to submit the "materiality" element of false statement prosecutions to the jury. That holding applies retroactively to cases on direct appeal at the time *Guadin* was decided, as was this case. *Griffith v. Kentucky*, 479 U.S. 314, 328 (1987). The Supreme Court and this Court have held that a Guadin error is subject to the harmless error standard of

review. See *United States v. Johnson*, 117 S.Ct. 1544 (1997); *United States v. Fern*, 117 F.3d 1298 (11th Cir. 1997).

Under this standard, "the government must show the absence of prejudice to the defendant's substantial rights." *Fern*, 117 F.3d at 1307. The government has carried its burden by showing that no reasonable jury could have found that Johnson's falsehoods were not material.

A statement is material if it has a natural tendency to influence or the capability to influence government action. *See United States v. Diaz*, 690 f.2d 1352 (11th Cir. 1982). The government is not actually required to rely upon the alleged false statements to make them material. *United States v. Calhoon*, 97 F.3d 518, 530 (11th Cir. 1996). The purpose of the materiality requirement is to "insure that the reach of § 1001 is confined to reasonable bounds and not allowed to embrace trivial falsehoods." *United States v. Gafyczk*, 847 F.2d 685, 691 (11th Cir. 1988).

Johnson's theory is that in his case the false statements would have been incapable of influencing the government due to the CIA's covert interest in assisting the Iraqi war effort. In making this argument, Johnson ignores that portion of the test making material statements with a "natural tendency" to influence. This Court has rejected the argument that individuals can defeat the materiality requirement by claiming that their falsehoods were consistent with unwritten government policy. Defendants cannot claim that they "made their knowing falsification with no intent to deceive." *United States v. Lichenstein*, 610 F.2d 1272, 1277 (5th Cir. 1980). Actual knowledge by the government is not a defense to the "materiality" requirement of false statement prosecutions. *See United States v. Whitaker*, 848 f.2d 914, 916 (8th Cir. 1988)

("The issue is whether the statements, viewed alone, were capable of influencing the function of the FDIC. It is irrelevant what the agent who heard the statement knew at the time of the statement."); *United States v. Rogers*, 118 F.3d 466,472 (6th Cir. 1997); *United States v. Johnson*, 530 f.2d 52, 54-55 (5th Cir. 1976) ("The natural and probable tendency of the affidavit to influence the decision to be made must be judged by the content of the document itself and not by any special knowledge possessed or acquired by the [Internal Revenue] Service."). Because the plain meaning of the false end-use statements would influence the Commerce Department in deciding whether or not to grant the export licenses they were clearly material. The defendant was not prejudiced by the court's failure to submit the materiality issue to the jury.

COMMODITIES JURISDICTION RULING

Johnson argues that because the OMC issued a Commodities Jurisdiction Ruling stating that zirconuim metal is a dual-use item, he cannot be convicted for exporting items on the Munitions List without a licence from the Department of State. Johnson was not convicted of exporting "zirconium" without a license, however, but rather of exporting zirconium compacts specifically designed for use in bombs without such a license. The district court properly held that such compacts were on the Munitions List. During the relevant time period, the Munitions List included:

> All specifically designed components, parts, accessories, attachments, and associated equipment [of bombs].

See 22 C.F.R. § 121.01, Category IV (g) (1983).

Because the indictment and the jury instructions both made clear that Johnson was charged with exporting zirconium compacts specifically designed for bombs, the district court correctly determined that such items were on the Munitions List. *See United States v. Tsai*, 954 F.2d 155, 160 (3d Cir. 1992) (holding evidence sufficient to prove that infra-red domes were specifically designed for missiles and therefore on the Munitions List).

Johnson alternatively argues that even if the zirconium compacts were on the Munitions List, he should have received a jury instruction on the uncertainty of the law, created, he says, by OMC's jurisdiction letter for zirconium sponge. Reviewed for an abuse of discretion, it is apparent that Johnson is not entitled to a reversal based on this argument. The Government correctly argues that Johnson has not shown that the law relating to export licensing was uncertain. Zirconium is its loose sponge or powder form was a dual-use item, the export of which was controlled by DOC. Zirconium compacted specifically for use in munitions is on the Munitions List and its export is controlled by DOS. The Commodities Jurisdiction ruling with regard to zirconium did not create any genuine uncertainty in the law with regard to the exportation of specially designed bomb components made out of zirconium. In cases involving criminal exports, the focus is on the defendant's subjective understanding of the law as a requirement of the "willfulness" element of the crime. *See United States v. Adames*, 878 F.2d 1374 (11th Cir. 1988); *United States v. Tsai*, 954 F.2d 155 (3d Cir. 1992). The district court's instructions clearly required the jury to find that Johnson knew that he was breaking the law. Because the jury found that Johnson knew that he was breaking the law, failure to instruct on uncertainty of the law was not error.

RULINGS CONCERNING CLASSIFIED INFORMATION

Johnson argues that the district court erroneously refused discovery and use of evidence of the CIA's covert policy to arm Iraq with Cardoen's cluster bombs. He claims that classified materials were relevant to four defenses: the materiality of his false statements, the removal of zirconium form the Munitions List, entrapment by estoppel, and public authority. He also contends that the district court improperly restricted evidence of Johnson's knowledge of TWCA management's connections with the intelligence community. This Court reviews a district court's evidentiary rulings for abuse of discretion. *United States v. Noriega*, 117 F.3d 1206,1215 (11th Cir. 1997).

Johnson devotes large portions of his appellate brief to arguments designed to convince us that the district court erroneously prevented him from presenting a "CIA" defense to the jury. The thrust of this defense was that, in an effort to execute a covert plan to assist Iraq in its war with Iran, the United States intelligence community secretly arranged for the zirconium shipments to bypass normal export regulations. According to this theory , government agents convinced Johnson, through a series of "winks and nods," to arrange for zirconium shipments to go to Chile by using fraudulent end-use statement. Alternatively, Johnson argues, even if he was unaware of this plot at the time, the covert operation rendered his actions non-criminal as a matter of law.

Johnson sought extensive discovery of classified documents in an effort to lay the foundation for this defense. Such effort are procedurally controlled by the Classified Information Procedures Act ("CIPA"), 18 U.S.C.App. 3 (1994).

This Act is designed to ensure that a trial court's evidentiary rulings on the use of classified information are made prior to trial. The purpose of the law is to prevent criminal defendants from "graymailing" the government by threatening to reveal irrelevant but sensitive information during trial. CIPA has no substantive impact on the admissibility or relevance of probative evidence. *See United States v. Noriega*, 117 F.3d 1206, 1215 (11th Cir. 1997); *United States v. Baptista-Rodriguez*, 17 F.3d 1354, 1363 (11th Cir. 1994). The district court held a CIPA hearing and reviewed *in camera* all classified CIA documents potentially bearing on zirconium shipments to Chile. At the CIPA hearing, the district court properly limited Johnson's proposed "CIA" defenses. The court carefully reviewed classified government documents and found no evidence supporting Johnson's theory that the CIA had secretly arranged to supply Cardoen with zirconium. After our own review of these classified materials, we agree with the district court that the government did not withhold any evidence supporting Johnson's "CIA" theory.

The court correctly held that Johnson could not use the defenses of entrapment by estoppel or public authority, unless he could show that he relied on official government communications before acting in a manner proscribed by law. *See United States v. Cardoen*, 898 F.Supp. 1563 (S.D. Fla. 1995).

Entrapment by estoppel occurs when a government official incorrectly informs a defendant that certain conduct is legal, the defendant believes the government official and is then prosecuted for acting in conformity with the official's advice. *United States v. Thompson*, 25 F.3d 1558, 1564 (11th Cir. 1994), *United States v. Billue*, 994 F.2d 1562, 1568 (11th Cir. 1993). Johnson's theory seems to be that, without actually

telling Johnson that his actions were legal, the government "conveyed through winks and nods" that the CIA authorized the zirconium exports. Even if this theory could provide a valid defense, Johnson points to no evidence to support his position. Because a review of the classified materials confirms that there was no evidence to support a defense of entrapment by estoppel, the district court properly limited the introduction of classified evidence.

The actual authority defense requires proof that a defendant reasonably relied upon the actual authority of a government official to request participation in an illegal activity. *See United States v. Anderson*, 872 F.2d 1508, 1513-15 (11th Cir. 1989); *United States v. Rosenthal*, 793 F.2d 1214, 1234-37 (11th Cir. 1986). Because Johnson could not point to any sort of detrimental reliance on his part, or, for that matter, any governmental involvement in the conspiracy, the district court also properly refused to permit Johnson to present this version of his "CIA" defense to the jury.

Johnson argues that classified evidence was relevant to show that his falsehoods were not "material" and that the "real" reasons for the OMC's commodities jurisdiction ruling was to facilitate the Iraqi war effort. Johnson further suggests that because the government presented evidence to the jury that the commodities jurisdiction ruling was fraudulently obtained, he had a constitutional right to challenge the government's position by presenting evidence that zirconium was removed from the list for political purposed. After carefully reviewing the classified material produced by the government, we have determined there is no such evidence in the record and, therefore, could not have been wrongfully excluded.

Johnson argues that he should have been able to testify

to his knowledge of and experience with his employer's relationship with the intelligence community. He claims that such evidence was relevant to his lack of specific intent for three reasons: he had a right to explain the circumstances of his behavior, he had a right to show that his beliefs were reasonable, and he had a right to show Cardoen's relationship with the United States government.

The district court properly refused this evidence because Johnson never laid a foundation for this evidence by suggesting that he relied on his co-conspirators' close relationship with the intelligence community in making his decision to use false end-use statements and bypass the AECA. IN the absence of reliance by Johnson, this evidence was irrelevant to Johnson's state of mind and therefore properly excluded by the district court.

SUPPLEMENTAL JURY INSTRUCTION ON GOOD FAITH

During its deliberations, the jury submitted a question to the court asking whether the "good faith" defense applies when a defendant acquires new information but continues to follow outdated advice previously obtained from counsel. Because Johnson had consulted a lawyer early in the conspiracy, the district court had originally given jury instructions on both a general defense. The gravamen of Johnson's complaint is that the court's supplemental jury instruction confused the jury on the requirements of these two separate but related defenses. A challenged supplemental jury instruction is reviewed as part of the entire jury charge, in light of the indictment, evidence presented and argument of counsel "to determine whether the jury was misled and whether the jury understood the issues." *Johns v. Gerard*, 927 F.2d 551, 554

(11th Cir. 1991) (citations omitted).

Although the jury's question was not a model of clarity, we agree with the district court that it related to the advice of counsel defense rather than to Johnson's lack of specific intent. In an abundance of caution, the district court repeated its entire good faith instruction before giving the contested supplemental instruction. The court reiterated that "good faith is a complete defense" and that "one who expresses an opinion honestly held by him is not chargeable with fraudulent intent." It then correctly answered the jury's question by instructing that "good faith reliance upon the advice of counsel requires not only full an complete disclosure of the facts then known but also of material facts or information later acquired...." Because this was a correct statement of the law, and because we believe that this instruction did not mislead the jury, there was no error in the court's supplemental jury instruction.

SENTENCING CROSS-APPEAL

The government appeals the sentence imposed on the conspiracy conviction. Count I charged Johnson with conspiracy to make false statements, conspiracy to violate the AECA, and conspiracy to violate the Export Administration Act ("EAA"). Although the jury acquitted Johnson on the substantive EAA charge, it convicted Johnson by general verdict on the conspiracy count. The district court sentenced Johnson as if only conspiracy to make false statements and conspiracy to violate the AECA had been proved. The government claims the district court did not make factual findings in support of this decision.

U.S.S.G. § 1B1.2 requires a district court to sentence a defendant convicted pursuant to a general jury verdict of a

multiple count conspiracy by applying the guidelines for those objects of the conspiracy the court finds had been proved beyond a reasonable doubt. The district court can make this finding "either implicitly or explicitly." *United States v. McKinley*, 995 F.2d 1020 (11th Cir. 1993). The parties specifically brought Guideline 1B1.2 to the attention of the district court at the sentencing hearing. After careful consideration, the district court refused to impose the guidelines sentence for conspiracy to violate the Export Administration Act. Under these circumstances, there was an implicit finding by the district court supporting its sentencing decision.

AFFIRMED.

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 95-5021

D.C. Docket No. 93-241-CR

UNITED STATES OF AMERICA.

Plaintiff-Appellee
Cross-Appellant,

versus

EDWARD A. JOHNSON,

Defendant-Appellant
Cross-Appellee.

Appeal from the United States District Court for the
Southern District of Florida

Before TJOFLAT and BIRCH, Circuit Judges, and RONEY, Senior Circuit Judge.

JUDGMENT

These causes came to be heard on the transcript of the record from the United State District Court for the Southern District of Florida, and were argued by counsel;

UPON CONSIDERATION WHEREOF, it is now hereby ordered and adjudged by this Court that the judgment of conviction of the said District Court and sentence imposed in this cause be and the same are hereby AFFIRMED.

Entered: April 28, 1998
For the Court: Thomas K. Kahn, Clerk

By: _____
Deputy Clerk

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 95-5021

UNITED STATES OF AMERICA.

Plaintiff-Appellee
Cross-Appellant,

versus

EDWARD A. JOHNSON,

Defendant-Appellant
Cross-Appellee.

On Appeal from the United States District Court for the
Southern District of Florida

ON PETITION(S) FOR REHEARING AND
SUGGESTION(S) OF REHEARING EN BANC
(Opinion _____, 11th Cir., 19___, ___ F.2d ___)

Before: TJOFLAT and BIRCH, Circuit Judges, and RONEY, Senior Circuit Judge.

PER CURIUM:

The Peition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court

having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

_____

UNITED STATES CIRCUIT JUDGE

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 95-5021

UNITED STATES OF AMERICA.

Plaintiff-Appellee
Cross-Appellant,

versus

EDWARD A. JOHNSON,

Defendant-Appellant
Cross-Appellee.

On Appeal from the United States District Court for the
Southern District of Florida

BEFORE: TJOFLAT and BIRCH, Circuit Judges, and
RONEY, Senior Circuit Judge.

PER CURIAM:

The petition(s) for rehearing filed by the Appellant, Edward A. Johnson, is DENIED.

ENTERED FOR THE COURT:

_____
UNITED STATES CIRCUIT JUDGE

(2)

Supr
NOV 23
CLERK

No. 98-495

In the Supreme Court of the United States

OCTOBER TERM, 1998

EDWARD A. JOHNSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

SETH P. WAXMAN
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6 pp

QUESTION PRESENTED

Whether the district court's failure to instruct the jury on the materiality element of the federal false statement statute, 18 U.S.C. 1001, was harmless error.

In the Supreme Court of the United States

OCTOBER TERM, 1998

No. 98-495

EDWARD A. JOHNSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A15) is reported at 139 F.3d 1359.

JURISDICTION

The judgment of the court of appeals (Pet. App. B1-B2) was entered on April 28, 1998. A petition for rehearing was denied on June 25, 1998 (Pet. App. C1-C2). The petition for a writ of certiorari was filed on September 23, 1998. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Southern District of Florida, petitioner was convicted of conspiracy to commit offenses against

the United States, in violation of 18 U.S.C. 371; two counts of making a false statement on a matter within the jurisdiction of an agency of the United States, in violation of 18 U.S.C. 1001 (1994); and one count of exporting defense-related materials from the United States without obtaining the required license, in violation of 22 U.S.C. 2778. He was sentenced to 41 months' imprisonment and ordered to pay a fine of $25,000. The court of appeals affirmed. Pet. App. A1-A15.

1. The Arms Export Control Act, 22 U.S.C. 2778(a)(1), authorizes the President to designate a list of defense-related articles, known as the "Munitions List." Articles on that list may not be exported from the United States without a license from the Department of State. 22 U.S.C. 2778(a)(1). Defense-related articles that have non-military applications, known as "dual use" items, may be exported from the United States with an export license from the Department of Commerce. 22 C.F.R. 120.3-120.4 (1985).

Zirconium is a rare metal with incendiary properties. Pet. App. A3. Compacted zirconium, which is specifically designed for use in cluster bombs, is listed on the Munitions List and requires a State Department license for export. Gov't C.A. Br. 2-3. Powder and sponge zirconium are dual use items, the export of which is licensed by the Department of Commerce. *Id.* at 3.

Petitioner was an ordnance sales manager for Teledyne Wah Chang Albany (TWCA), an American manufacturing company. In 1982, petitioner received orders from Carlos Cardoen, an international arms dealer in Chile, for zirconium sponge compacts. When TWCA requested an end-use statement for the zirconium, Cardoen's company submitted a statement falsely stating that the zirconium would be used as a booster material in industrial explosives sold to the mining

industry. TWCA then sought a ruling from the Department of State Office of Munitions Control (OMC) on whether zirconium was on the Munitions List. TWCA explained that it wished to export zirconium for use in industrial explosives. In 1983, OMC ruled that because zirconium was a dual use item, it was excluded from the Munitions List. After receiving that ruling, TWCA applied for licenses from the Department of Commerce to export zirconium to Cardoen. To obtain those licenses, TWCA submitted the false end-use statements that it had obtained from Cardoen. After receiving the licenses, TWCA exported 134 tons of zirconium compacts worth $3.5 million to Cardoen, who used them to produce cluster bombs that he sold to Iraq for use during the Iraq-Iran war. Pet. App. A3-A5; Gov't C.A. Br. 3-4, 13.

Petitioner was Cardoen's primary contact at TWCA for the zirconium orders, and he negotiated pricing and shipping arrangements on behalf of TWCA. Pet. App. A4. During the course of the conspiracy, petitioner visited Cardoen's arms factory in Chile and took with him zirconium samples specifically designed for use in cluster bombs. Gov't C.A. Br. 5. On several occasions, petitioner admitted that he knew that the end-use statements were false and that the zirconium compacts were being used to manufacture Iraqi cluster bombs. *Id.* at 6-7; Pet. App. A5. Petitioner continued to process Cardoen's orders for weapons-grade zirconium after making these statements. Gov't C.A. Br. 7-8.

2. The false end-use information provided to the Department of Commerce formed the basis for the counts of the indictment charging that petitioner had made materially false statements to an agency of the United States, in violation of 18 U.S.C. 1001 (1994). At trial, petitioner proposed two conflicting jury instruc-

tions on the materiality of the statements allegedly made in violation of that statute. One instruction set forth the principle, then settled under Eleventh Circuit law, that materiality was an issue for the court, not the jury. Another proposed jury instruction, however, would have required the jury to decide whether the alleged false statements were material. Gov't C.A. Br. 48-49. The district court ruled that materiality was a question for the court and instructed the jury that the alleged false statements were material. Pet. App. A6.

3. After petitioner's trial, this Court held in *United States* v. *Gaudin*, 515 U.S. 506 (1995), that the Fifth and Sixth Amendments require the materiality element of a Section 1001 offense to be submitted to the jury for determination. Although the court of appeals found *Gaudin* applicable to petitioner's case, it held that the error in the jury instructions was harmless because no reasonable jury could have found that petitioner's false statements were not material. Pet. App. A7. The court first stated that a statement is material if "it has a natural tendency to influence or the capability to influence government action." *Ibid.* The court rejected petitioner's argument that "the false statements would have been incapable of influencing the government due to the CIA's covert interest in assisting the Iraqi war effort." *Ibid.* The court held that defendants cannot "defeat the materiality requirement by claiming that their falsehoods were consistent with unwritten government policy." *Ibid.* The court then held that "[b]ecause the plain meaning of the false end-use statements would influence the Commerce Department in deciding whether or not to grant the export licenses they were clearly material." *Id.* at A8.

DISCUSSION

Petitioner contends (Pet. 3-15) that the court of appeals erroneously held that the district court's failure to allow the jury to consider whether the charged false statements were material can be harmless error. On October 13, 1998, this Court granted certiorari in *Neder* v. *United States*, No. 97-1985, on two questions, one of which is whether the failure to instruct the jury on the materiality element of a federal offense can be harmless error when materiality is not in dispute at trial. The Court's resolution of that issue in *Neder* is likely to have a direct effect on the validity of the court of appeals' disposition of petitioner's case. Accordingly, the Court should hold this petition pending the disposition in *Neder*.

CONCLUSION

The petition for a writ of certiorari should be held and disposed of as appropriate in light of the Court's disposition of *Neder* v. *United States*, No. 97-1985.

Respectfully submitted.

SETH P. WAXMAN
Solicitor General
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Attorney

NOVEMBER 1998

Supreme Court, U.S.
FILED
DEC 4 1998
CLERK

No. 98-495

In The
Supreme Court of the United States
October Term, 1998

EDWARD A. JOHNSON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

REPLY TO BRIEF OF UNITED STATES

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3 pp

COUNTERSTATEMENT

This counterstatement is submitted because the Government's Statement of record facts is inaccurate. The factual record establishes that materiality was an essential element in the statutes involved and the issue of materiality was seriously disputed in the District Court. Over objection, the District Court directed the verdict on materiality.

1. Contrary to the Government's statement, "compacted zirconium" is not listed on the Munitions List under the Arms Export Control Ace, 22 U.S.C. 2778 (a)(1). In 1983, the Department of State Office of Munitions Control (OMC) ruled that because zirconium was a dual use item, it was **excluded** from the Munitions List. Appellant's C.A. Br. 13. It was material, and an issue that must have been determined by the jury, whether the zirconium exported required an export license for the Department of State.

2. Contrary to the Government's statement, the principal business of Carlos Cardoen was in the mining industry in Chile. Also, Mr. Cardoen, as part of a secret CIA covert operation known to the Government, pursued international arms sales to Iraq. Appellant C.A. Br. 3-11. In pursuit of that covert operation, Cardoen submitted false end-user statements claiming the compacted zirconium was for industrial explosives used in mining operations. Because of Mr. Cardoen's "cooperation" with the United States, it was an issue whether the false end-user statements were "material" to the granting of the export license since the Government was aware of and facilitated the use.

DISCUSSION

The Government contends that the writ of certiorari should be held and disposed of as appropriate in light of the court's disposition of *Neder v. United States*, No. 97-1985.

Petitioner contents that this case is a more appropriate vehicle to determine the issue whether the district court's failure to allow the jury to consider whether the charged false statements were material can be harmless error. In this case, "materiality" was an essential element of the criminal statute and, contrary to the facts in *Neder*, the issue of materiality was significantly disputed in the trial.

Accordingly, the resolution of the issue in *Neder* will not consider the breadth of the various issues of materiality raised in a context that will provide appropriate guidance to the Circuit Courts of Appeal.

CONCLUSION

This petition for writ of certiorari should be granted. In the alternative, this petition should be granted, consolidated with *Neder v. United States*, No. 97-1985 and considered simultaneously by the Court.

Respectfully submitted,

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